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No. 06-____

IN THE

Supreme Court of the United States

TOMMIE GLANTON, ON BEHALF OF THE ALCOA PRESCRIPTION DRUG PLAN, AND ALL OTHER SIMILARLY-SITUATED PLANS, AND TARA MACKNER, ON BEHALF OF THE KMART COMPREHENSIVE HEALTH PLAN, PETITIONERS

v.

ADVANCE PCS HEALTH, L.P.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 2007

QUESTION PRESENTED

Did the Ninth Circuit erroneously hold that the express congressional grant of statutory standing in Sections 502(a)(2)-(3) of ERISA violates Article III of the United States Constitution?

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Kenneth Culp Davis & Richard J. Pierce, ADMINISTRATIVE LAW TREATISE (3d ed. 1994) 23

Department of Labor Field Assistance Buletin 2002-3 (Nov. 5, 2002), at http://www.dol.gov/ebsa/regs/fab_2002-3.html 25

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PETITION FOR A WRIT OF CERTIORARI

Tommie Glanton, on behalf of the ALCOA Prescription Drug Plan and all other similarly-situated plans, and Tara Mackner, on behalf of the Kmart Comprehensive Health Plans, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 465 F.3d 1123. The order and opinion of the district court granting respondent's motion for judgment on the pleadings (App., *infra*, 9a-18a) and the order of judgment dismissing the complaints entered November 7, 2003 (App., *infra*, 19a-20a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 17, 2006 (App., *infra*, 1a-8a). A timely petition for rehearing and rehearing *en banc* was denied on January 8, 2007 (App., *infra*, 21a). On April 3, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 23, 2007. No. 06-A-941. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Rule 29.4(b), petitioners certify that 28 U.S.C. § 2403(a) may apply and that this petition has been served on the United States Solicitor General.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. § 1001 *et seq.*), are reproduced at App., *infra*, 33a-36a.

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates "employee benefit plans," 29 U.S.C. § 1002(3), which include "employee welfare benefit plans" maintained by an employer "for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). Employee welfare benefit plans are commonly called "employee health plans."

2. As of 2002, 137 million workers, retirees, and their families were covered by ERISA employee health plans.[1] Almost all private health insurance in the United States is provided through employer-sponsored plans and is thus subject to ERISA.[2]

Total spending on health care in the United States was $2 trillion in 2005, and is projected to reach $2.9 trillion in 2009.[3] Private employers contributed over $500 billion to ERISA employee health plans in 2003.[4] Due to rising health care costs, private employers have increasingly shifted ERISA health plan expenses to employees, and the percentage of private health insurance premiums paid by

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[1] Brief of the Secretary of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland,* 367 F.3d 638 (CA6 2004) at 13.

[2] Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights,* 42 BRANDEIS L. J. 529, 538 (2004).

[3] National Coalition on Health Care, *Facts on Health Care Costs,* at http://www.nchc.org/facts/2007%20updates/cost.pdf.

[4] Employee Benefit Research Institute, *Finances of Employee Benefits, 1960-2003* (Jan. 2005), at http://www.ebri.org/pdf/publications/facts/0205fact.b.pdf.

employers declined from a high in 2000 of 76.0 percent to 74.6 percent in 2003.[5]

The average employee contribution to employer-sponsored ERISA health plans has increased more than 143 percent since 2000,[6] and currently exceeds $100 million each year.[7] Between 2000 and 2005, the average employee out-of-pocket costs for deductibles, co-payments for medications and co-insurance for physician and hospital visits rose 115 percent.[8]

3. Section 502(a) of ERISA is entitled "Civil Enforcement." This section sets forth the exclusive remedies available under the statute.[9] The importance of Section 502(a) can hardly be overstated: Section 502(a) provides the only means for the remediation of most wrongs suffered in the employee health care context. This is the result of the extraordinary breadth of subject matter covered by the ERISA statute coupled with an extremely strong ERISA preemption doctrine.[10]

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[5] Cathy A. Cowan & Micah B. Hartman, *Financing Health Care: Businesses, Households and Governments, 1987-2003*, 1 Health Care Financing Review (Web Exclusive) 11 (July 2005), at http://www.cms.hhs.gov/HealthCareFinancingReview/downloads/Web_Exclusive_Cowan.pdf.

[6] *Facts on Health Care Costs*, *supra* note 3.

[7] Cowan & Hartman, *supra* note 5, at 10.

[8] *Facts on Health Care Costs*, *supra* note 3.

[9] *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

[10] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

Specifically, Section 502(a) "contains a six-part list of remedies, of which the final three, subsections (4)-(6), are peripheral. Subsections (1)-(3) * * * constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought."[11] The question presented by this petition involves the constitutional validity of subsections (2) and (3).[12]

Section 502(a)(2) is restricted to actions for fiduciary liability under 29 U.S.C. § 1109 and provides that "a civil action may be brought * * * by the Secretary, or a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109(a) in turn provides that "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable * * * to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." "Section 409(a) [29 U.S.C. § 1109] provides for recovery by the plan, as opposed to recovery by the participant or beneficiary who brings suit on behalf of the plan. In such a case, the participant or beneficiary would benefit indirectly, by enhancing the value of the plan's assets."[13]

Section 502(a)(3) similarly authorizes lawsuits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or

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[11] John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail Of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted).

[12] Routine benefit denials are governed by Section 502(a)(1), and Section 502(a)(4) concerns various reporting and disclosure requirements. Neither Section 502(a)(1) nor 502(a)(4) is at issue in this case.

[13] Langbein, *supra* note 11, at 1334.

practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan." Section 502(a)(3) is a "catchall" provision that authorizes participants and beneficiaries to obtain "appropriate equitable relief for injuries caused by violations that Section 502 does not elsewhere adequately remedy."[14]

4. Petitioner Tommie Glanton is an employee of ALCOA and a participant in the ALCOA Prescription Drug Plan, an employer-sponsored ERISA health plan (the "ALCOA Plan"). Petitioner Tara Mackner was an employee of Kmart and a participant in the Kmart Comprehensive Health Plan, another employer-sponsored health care plan (the "Kmart Plan"). Both the ALCOA Plan and the Kmart Plan are funded by contributions made by the plan sponsors (*i.e.*, ALCOA and Kmart), as well as co-insurance, deductibles, co-payments, and other contributions made by Glanton, Mackner, and the other plan participants and beneficiaries.

The prescription drug benefits provided by both the ALCOA Plan and the Kmart Plan (the "Plans") are administered by Advance PCS Health, L.P. ("AdvancePCS"). AdvancePCS is a pharmacy benefits manager, or "PBM," for the Plans. AdvancePCS and other PBMs process prescription drug claims for ERISA plans in return for administrative fees. AdvancePCS is responsible not only for prescription drug claims administration on behalf of the Plans, but also the development and modification of formularies, establishment of retail pharmacy networks, negotiation of pricing arrangements with network pharmacies, and negotiation with drug manufacturers to provide rebates to the Plans. In short,

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[14] *Id.* at 1335.

AdvancePCS decides what drugs are purchased by the Plans, from whom, and on what basis. Moreover, when a plan participant or beneficiary presents a prescription from a physician to a pharmacy, AdvancePCS makes the determination whether to purchase the drug, to reject the claim, or to switch the participant to a different drug (*e.g.*, to a generic or other substitute).

5. On March 21, 2002, Glanton filed a civil action against AdvancePCS, and on March 31, 2003, Mackner filed a similar action, on behalf of the Plans pursuant to Sections 502(a)(2) and (a)(3). Glanton and Mackner (collectively, "petitioners") alleged that AdvancePCS violated its fiduciary duties to the Plans through, *inter alia*, (1) obtaining payments, discounts, rebates, and other fees from drug manufacturers without passing this undisclosed compensation to the Plans; (2) creating and pocketing a "spread" in discount and dispensing fees (*e.g.*, paying a pharmacy only 80 percent of the full price of a drug but charging the Plans 85 percent of the full price, retaining the 5 percent "spread" for itself); (3) enriching itself through "drug-switching," in which AdvancePCS encouraged the use of substitutes manufactured or sold by the companies with whom AdvancePCS has favorable contractual arrangements, generating additional profits for AdvancePCS but an increase in costs for the Plans and their participants; and (4) retaining interest on the "float" during the period between when rebates are paid to AdvancePCS and when AdvancePCS elects to transmit these rebates to the Plans.

Petitioners alleged that AdvancePCS received and retained this compensation in violation of the anti-inurement provisions of 29 U.S.C. § 1103, which provide that "all assets of an employee benefit plan shall be held in trust" and that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to the participants of the plan and their

beneficiaries." Petitioners further alleged that AdvancePCS was required to disgorge all such compensation to the Plan, and should be enjoined from retaining future compensation, pursuant to 29 U.S.C. § 1109(a), which provides that "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable * * * to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Because petitioners were participants in and beneficiaries of the Plan, Section 502(a)(2) expressly entitled them to seek such relief, as this subsection provides that "a civil action may be brought * * * by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

6. Petitioners' lawsuits were subsequently consolidated, and on November 7, 2003, the district court granted AdvancePCS judgment on the pleadings and dismissed petitioners' complaints. App., *infra*, 9a-20a.

Petitioners timely appealed to the Ninth Circuit. The Secretary of Labor submitted to the Ninth Circuit a brief *amicus curiae* in support of petitioners in which she argued that the district court had improperly dismissed the complaints. The Secretary contended that Congress's express grant of standing to plan participants and beneficiaries in Section 502(a) was not a violation of Article III of the Constitution and that "[t]he district court erred in holding that plaintiffs lacked standing to bring their suit on behalf of the Plans." App., *infra*, 32a; see also generally *id.* at 22a-32a. Specifically, the Secretary argued that ERISA Section 502(a) – consistent with Article III – validly authorized participants and beneficiaries of a plan to sue on behalf of that plan because, *inter alia*, (1) Section 502(a) constitutionally granted participants and beneficiaries the statutory right to

recover for injuries to the plan resulting from breaches of fiduciary duty, and such statutory standing was consistent with both historical precedent and Article III;[15] (2) petitioners had representational standing, pursuant to Section 502(a), sufficient under Article III to seek relief on behalf of the Plans;[16] and (3) petitioners likely also suffered injury-in-fact from the breaches of fiduciary duty by AdvancePCS as a result of both the impact of these breaches on the financial integrity of the Plans[17] as well as from increased co-payments and restricted drug choices.[18]

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[15] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 24a ("[S]ince the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recoverable by the Plans, which have allegedly been injured by fiduciary breaches. This is enough to establish standing for Article III purposes.").

[16] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a ("Because * * * the plaintiffs have representational standing under section 502 to sue to redress the alleged injuries to the Plans, they meet the causation and redressability prongs of Article III standing as well. Plaintiffs' claim that the disloyal actions by Advance injured the Plans, and injunctive or monetary relief could conceivably remedy that injury.").

[17] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a ("Section 502(a)(2), the enforcement provision for § 409, authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. [T]he common interest shared by all four classes is the financial integrity of the plan." (quoting *Russell*, 473 U.S. at 142 n.9)).

[18] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 31a ("We note that in the present case, however, the participants and beneficiaries

The Ninth Circuit issued a published opinion on October 17, 2006 in which it held that Congress had indeed expressly granted petitioners the right to sue AdvancePCS for breach of fiduciary duty and to recover on behalf of the Plans. App., *infra*, 3a. The Ninth Circuit, however, concluded that this congressional grant of statutory standing in Section 502(a) violated Article III of the Constitution. The Ninth Circuit rejected the Secretary's arguments that valid statutory and representational standing existed because, in the court's view, "ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans – as would the benefits of injunctive relief." App., *infra*, 5a. The Ninth Circuit also rejected the alternative argument that Section 502(a) was constitutional because ERISA participants and beneficiaries suffer injury-in-fact on the ground that while recovery on behalf of the Plans might well reduce co-payments, drug costs, or employee contributions, "nothing would force ALCOA or K-Mart to do this," and they might instead merely reduce their own contributions to the Plans. App., *infra*, 4a. The Ninth Circuit thus held that the grant of standing to plan participants and beneficiaries in Section 502(a) violated Article III of the Constitution.

Petitioners timely filed a petition for rehearing and rehearing *en banc*, which the Ninth Circuit denied on January 8, 2007. App., *infra*, 21a.

This petition for a writ of certiorari followed.

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may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure.").

REASONS FOR GRANTING THE WRIT

The Ninth Circuit held that Sections 502(a)(2) and 502(a)(3) of ERISA violate Article III of the Constitution notwithstanding the express creation by Congress therein of a statutory right of participants and beneficiaries to sue plan fiduciaries on behalf of the plan. This decision invalidates the central and most critical enforcement mechanism of ERISA. As the Secretary of Labor argued in her *amicus* brief to the Ninth Circuit, the inability of plan participants and beneficiaries to file actions under Section 502(a) will cause massive harm to the financial integrity of ERISA health plans as well as dramatically alter the "carefully integrated civil enforcement provisions" enacted by Congress in Section 502(a).[19] Moreover, as the Secretary of Labor correctly noted below, the Ninth Circuit's invalidation of Section 502(a) on standing grounds is entirely inconsistent with this Court's precedents.

This Court's ordinary practice is to grant certiorari when a court of appeals invalidates a federal statute, even in the absence of a circuit conflict.[20] That practice is consistent with this Court's admonition that declaring a statute unconstitutional is the "gravest and most delicate" of judicial

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[19] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 25a.

[20] *See, e.g., Ashcroft v. ACLU,* 542 U.S. 656 (2004); *United States v. Morrison,* 529 U.S. 598 (2000); *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998); *Babbitt v. Youpee,* 519 U.S. 234 (1997); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995); *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995); *United States v. Edge Broad. Co.,* 509 U.S. 418 (1993); *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307 (1993); *cf.* Robert L. Stern et al., SUPREME COURT PRACTICE 244 (8th ed. 2002) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

tasks, *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and also with this Court's own guidelines concerning certiorari review, which indicate that certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

The enforcement mechanisms enacted by Congress in Section 502(a) are both essential to the financial integrity of employee ERISA health plans and do not violate Article III. The critical nature of the ERISA enforcement regime, as well as the sheer number of Americans and amount of money implicated by the resolution of the question presented, heightens the significance of the constitutional validity of Section 502(a). Moreover, this petition presents an ideal opportunity for this Court to resolve broader issues regarding the validity of statutory standing under Article III as well.

Section 502(a)(2) of ERISA provides that "a civil action may be brought * * * by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."[21] Section 502(a)(3) further authorizes lawsuits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan."[22]

Petitioners were participants and beneficiaries of the Plans. They alleged that AdvancePCS breached its fiduciary duties to the Plans by accepting and retaining undisclosed compensation that belonged to the Plans.[23] As remediation

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[21] 29 U.S.C. § 1132(a)(2).

[22] 29 U.S.C. § 1132(a)(3).

[23] *See, e.g.*, 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants

for these breaches, petitioners sought equitable and injunctive relief that, *inter alia*, required AdvancePCS to disgorge all such compensation to the Plans.[24]

The Ninth Circuit recognized that Section 502(a) expressly authorized petitioners, as ERISA participants and beneficiaries, to bring such an action but held that such congressionally authorized standing violated Article III of the Constitution. The Ninth Circuit reasoned as follows:

> To establish standing under *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555 (1992)], plaintiffs must show a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation. * * * [Plaintiffs] claim that Advance PCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this * * * ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted. * * * ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans—as would the benefits of injunctive relief.[25]

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and beneficiaries and – (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries."); 29 U.S.C. § 1103(c)(1) ("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries.").

[24] *See* 29 U.S.C. § 1109(a) (expressly authorizing such relief).

[25] App., *infra*, 3a-5a.

Review of the question presented is warranted for two reasons. First, as the Secretary of Labor recognized below, the validity of participant and beneficiary standing granted by Section 502(a) to sue for breaches of fiduciary duty is of exceptional importance, and is critical to the effective enforcement of ERISA.[26] Second, as the Secretary of Labor also correctly identified below, the Ninth Circuit's invalidation of Section 502(a) is inconsistent with this Court's precedents.[27]

A. The Question Presented is of Exceptional Importance.

For most participants of employee health plans, filing a civil action under Section 502(a) is the only means through which losses caused by the misconduct of a fiduciary may be recovered, as state law claims against a breaching fiduciary are preempted by ERISA. As a result, the Ninth Circuit's holding that the congressional grant of standing in Section 502(a) violates Article III makes the substantive provisions of ERISA effectively unenforceable.

As the Secretary of Labor explained below, the "carefully integrated civil enforcement provisions" of Section 502(a) are designed not only to ensure that breaches of duty by plan fiduciaries are sufficiently deterred, but also that the consequences of prior fiduciary misconduct are promptly and effectively remedied.[28] The ability of participants and beneficiaries to file suit against plan fiduciaries pursuant to Section 502(a) is essential to the "carefully integrated" ERISA enforcement regime established by Congress.

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[26] *See* Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 23a-25a.

[27] *Id.*, App., *infra*, 25a-31a.

[28] *Id.*, App., *infra*, 25a.

Actions by participants and beneficiaries on behalf of the plan are a deliberate and central feature of ERISA. As this Court noted in *Russell*, Section 502(a)(2) "authorizes suits by four classes of party-plaintiffs, the Secretary of Labor, participants, beneficiaries, and fiduciaries" for relief to the plan for a fiduciary breach of 29 U.S.C. § 1109. 473 U.S. at 142 n.9. The Ninth Circuit's invalidation of participant and beneficiary standing under Section 502(a)(2) would thus leave enforcement of § 1109 exclusively to the Secretary of Labor and the plan fiduciaries.[29]

Plan fiduciaries cannot be expected to bring breach of fiduciary duty claims against themselves.[30] This leaves suits by the Secretary of Labor as the sole available enforcement mechanism against plan fiduciaries. However, not only are lawsuits by the Secretary of Labor a small fraction of ERISA actions, but Congress correctly concluded in Section 502(a)(2) that such actions alone would not suffice, and that lawsuits by informed and interested plan participants and beneficiaries were instead essential to the enforcement of § 1109.[31]

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[29] ERISA does not permit plan sponsors (*e.g.*, ALCOA and Kmart) to file breach of fiduciary duty claims, nor does the plan itself have any such right. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 134, 209 (2002); *Harris v. Provident Life*, 26 F.3d 930, 933 (CA9 1994).

[30] Other plan fiduciaries, if any exist, are likely to lack incentive to bring claims against other fiduciaries. Moreover, under the Ninth Circuit's holding, because any such claims must be brought on behalf of the plan, these fiduciaries would lack Article III standing, as any injury (and monetary relief) would be to the plan rather than to the fiduciary. In any event, it was precisely because Congress did not trust plan fiduciaries to bring fiduciary duty claims that Section 502(a) authorized actions by plan participants and beneficiaries.

[31] *See* S. Rep. No. 93-127, at 35 (1973); H.R. Rep. No. 93-1280, at 301, 320-27 (1974) (Conf. Rep.); 120 Cong. Rec. 29,933 (1974).

Exclusive reliance upon enforcement actions by the Secretary of Labor would negate the effective enforcement of ERISA against plan fiduciaries for two additional reasons as well. First, while Section 502(a)(2) authorizes lawsuits by the Secretary to enforce 29 U.S.C. § 1109, the Secretary is not permitted to bring actions alleging other breaches of fiduciary duty – or violation of the plan itself – pursuant to Section 502(a)(3).[32] The Ninth Circuit's invalidation of plan participant and beneficiary standing under Article III thus entirely removes the ability to bring Section 502(a)(3) fiduciary duty claims. Moreover, under the Ninth Circuit's holding, if plan participants and beneficiaries lack Article III standing, then the Secretary of Labor almost certainly lacks standing as well, as the Secretary suffers less injury-in-fact than the participants and beneficiaries of the plan. Alternatively, as explained *infra*, if Congress may invest the Secretary with Article III standing as a representative of the plan, it may validly do so for plan participants and beneficiaries as well.

The Ninth Circuit's invalidation of Section 502(a) on Article III standing grounds removes the central enforcement mechanism of ERISA. Moreover, as the Secretary of Labor cogently noted below, the Ninth Circuit did so in a manner directly contrary to the "carefully integrated" fashion through which Section 502(a) applies and enforces duties against plan fiduciaries. As the Secretary explained:

> [I]n holding that ERISA does not permit claims for compensatory damages (which it termed "extra contractual"), the Supreme Court reasoned that those

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[32] 29 U.S.C. § 1132(a)(3) (authorizing only suits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan").

> who sue under section 502(a)(2) may do so only to recover for injury to the plan. *Russell*, 473 U.S. at 148. * * * Given that section 502(a)(2) therefore does not encompass claims for individual relief at all, courts following *Russell* have denied recovery to participants and beneficiaries suing for relief under this provision. *See Hozier* [*v. Midwest Fasteners, Inc.*, 908 F.2d 155, 1162 n.7 (CA7 1990)] (claim to recover individual benefits not authorized under sections 409 and 502(a)(2) because these provisions only allow "individual participants to sue in a representative capacity on behalf of the plan"); *Carr v. Malcolm & Riley, P.C.*, No. 90-6407, 1991 WL 67749, at *8 (E.D. Pa. Apr. 25, 1991) (same). It would be irrational, indeed, to conclude that participants must show individual harm in order to have standing to sue under Section 502(a)(2), but they cannot individually recover for that harm under that very provision.[33]

Under the Ninth Circuit's interpretation of Section 502(a), the breaching fiduciary of an employee health plan will enjoy almost total immunity from even the most egregious violations of ERISA. Fiduciaries will be able, as here, to self-deal, or even to steal directly from the plan, with *no risk whatsoever* that a participant or beneficiary will be able to file an action to recover these ill-gotten proceeds or to enjoin such misconduct.

Each year, as noted *supra* at 2-3, over $500 billion in assets are contributed by employers and employees to ERISA health plans, and over 20 million participants and beneficiaries are covered by such plans in the Ninth Circuit

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[33] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 29a.

alone. Section 502(a) provides the only effective means through which these critical health care assets are protected.

As this Court noted in *Great-West*, because ERISA "is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system," and contains a "carefully crafted and detailed enforcement scheme," this Court has "been especially reluctant to tamper with the enforcement scheme." 534 U.S. at 209. The Ninth Circuit's invalidation of Section 502(a) vitiates the delicate enforcement regime carefully designed by Congress to safeguard the half-trillion dollars contributed yearly to ERISA health care plans that provide critical medical care to 137 million workers. This decision by the Ninth Circuit cries out for review by this Court.

B. The Ninth Circuit's Invalidation of Section 502(a) Conflicts With This Court's Precedents.

As the Secretary of Labor correctly argued below, the grant of standing in Section 502(a) to plan participants and beneficiaries to seek relief on behalf of their plans does not violate Article III. This is true for two distinct reasons. First, plan participants and beneficiaries suffer injury-in-fact from the diversion of plan assets. Second, wholly apart from their own injuries, plan participants and beneficiaries have valid statutory standing to file suit as representatives of their plan.

1. The Ninth Circuit's holding conflicts with this Court's injury-in-fact precedents.

For Article III standing to exist based upon injury-in-fact, litigants must suffer the concrete invasion of a legally protected interest that will be redressed by a favorable outcome of the litigation. *Lujan*, 504 U.S. at 561. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the

controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The Ninth Circuit held that participants and beneficiaries do not have injury-in-fact standing because even were they to recover millions of dollars from a plan fiduciary on behalf of the plan, employers might respond to such recovery by reducing their own contributions to the plan, thereby offsetting any recovery.[34] Such a possibility, however, does not obviate Article III standing, and participants and beneficiaries suffer injury-in-fact notwithstanding this potentiality for multiple independent reasons.

First, the Ninth Circuit's holding is both temporally and doctrinally misguided. Regardless of how employers *might* potentially respond to recovery on behalf of the Plans, the immediate result of the lawsuit would be to infuse the Plans with millions of dollars in additional funds. Pursuant to the anti-inurement provisions of ERISA, these sums would be required to be expended on participants and beneficiaries, as § 1103(c)(1) requires that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive benefit of providing benefits to participants in the plan and their beneficiaries."[35] Actions under Section 502(a)

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[34] *See* App., *infra*, 4a ("[Plaintiffs] claim that AdvancePCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this. * * * ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted.").

[35] 29 U.S.C. § 1103(c)(1). Whether, as noted *infra*, the employer subsequently responds by decreasing its own contributions is irrelevant,

thus provide the type of immediate and concrete benefit to participants and beneficiaries sufficient to create standing under Article III.

Second, in a related manner, regardless of the employer's eventual response, participants and beneficiaries immediately and concretely benefit from recovery on behalf of the plan pursuant to Section 502(a) because the infusion of such sums tangibly advances the financial integrity of the plan. This is not only an immediate and concrete benefit to participants and beneficiaries, but as this Court expressly noted in *Russell*, such a result is precisely why Congress enacted Section 502(a)(2) in the first place:

> Section 502(a)(2), the enforcement provision for § 409, authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries * * * * [T]he common interest shared by all four classes is the financial integrity of the plan.

473 U.S. at 142. The infusion of millions of dollars into a health care plan, especially in an era of corporate implosions (*e.g.*, Enron) and bankruptcies (*e.g.*, Kmart), is a concrete and immediate benefit to the financial integrity of the plan

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as participants and beneficiaries obtain an immediate benefit from the infusion of money that is statutorily required to be expended on their behalf. Moreover, given that the anti-inurement provisions of ERISA expressly provide that assets of the plan, including those recovered on behalf of the plan pursuant to Section 502(a), "shall never inure to the benefit of an employer," § 1103(c)(1) may itself preclude employers from diminishing their own contributions in response to recovery by the plan, as allowing such a response would mean that plan assets "inure[d] to the benefit of the employer" in precisely the manner prohibited by § 1103(c)(1). *See also* 29 U.S.C. § 1104(a)(1)(A)(i) (containing additional analogous provisions).

sufficient to create Article III standing on behalf of participants and beneficiaries.[36]

Third, the Ninth Circuit's reliance upon what an employer might potentially do in response to recovery on behalf of the Plans in assessing Article III standing is both doctrinally irrelevant and inconsistent with this Court's precedents. The immediate result of any recovery under Section 502(a) is the infusion of millions of dollars into a plan. The mere fact that a third party might potentially respond to such recovery by diminishing other contributions is not dispositive. A college student, for example, clearly has Article III standing to sue a defendant for $5,000 in personal injuries even if the student's father (or rich uncle) might potentially decrease his contribution to the student's college fund penny-for-penny for every dollar that the student recovers from the tortfeasor.

This Court has repeatedly held that Article III standing exists notwithstanding potential follow-on conduct of a third party in response to success in litigation. Most recently, for example, in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), this Court held that the plaintiff demonstrated injury-in-fact from potential global warming sufficient to satisfy Article III even though the requested regulation of greenhouse gas emissions by the United States could easily be overwhelmed by emissions from China and India (and, perhaps, that these

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[36] This is especially the case given the importance of the integrity of such plans to participants and beneficiaries. *Mertens v. Kaiser Steel Ret. Plan*, 744 F. Supp. 917, 921 (N.D. Cal. 1990) ("In Section 409 actions, plan participants and beneficiaries lack the direct right to relief typically held by class members, since the actions are brought on behalf of the plans. Nevertheless, they retain vital interests in those suits, since any equitable or monetary relief awarded to the plan would ultimately benefit them. * * * For health and welfare plan participants and beneficiaries, the plan may be all that stands between them and devastating medical bills."), *aff'd*, 948 F.2d 1105 (CA9 1991).

countries might respond to the United States' reduced emissions by increasing their own). *Id.* at 1458.

The Ninth Circuit's interpretation of Article III is also flatly inconsistent with this Court's unanimous decision in *Bryant v. Yellen*, 447 U.S. 352 (1980). *Bryant* held that farmworkers who wanted to buy land in the Imperial Valley had Article III standing to challenge a regulation that would make it less expensive to irrigate parcels over 160 acres on the theory that invalidation of the regulation might drive down the market price of such parcels. *Id.* at 367-68. There was in *Bryant* nothing that would *force* prices to decline, or that would *force* any landowner to sell her land, or that would *force* an owner to sell her property to the plaintiffs rather than to someone else. *Cf.* App., *infra*, 4a ("[T]he plans might then reduce contributions or co-payments. But nothing would *force* ALCOA or K-Mart to do this."). *Bryant* nonetheless held that the fact that the subsequent acts of a third party could potentially obviate the benefits of recovery did not vitiate Article III standing. 447 U.S. at 367-68.

The fact that China, India, Imperial Valley landowners, rich uncles, or employers with health plans might potentially act adversely to a victory by the plaintiff does not deprive the federal courts of Article III standing.[37] The Ninth Circuit's

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[37] It is one thing to say, as Justice Kennedy did in his separate opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), that generalized taxpayer standing does not exist under Article III merely because a lawsuit might financially benefit the State and hence potentially result in lower taxes or better schools. *Id.* at 613-14 (opinion of Kennedy, J.) ("As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's interest in the moneys of the treasury are shared with millions of others, is comparatively minute and indeterminable; and the effect on future taxation * * * so remote, fluctuating and uncertain, that no basis is afforded for judicial intervention." (citations omitted)). It is quite another, however, to say that Congress cannot validly permit the recovery

invalidation of Section 502(a) based upon a contrary view conflicts with both doctrine and this Court's precedent.

Fourth, Section 502(a) complies with the injury-in-fact requirements of Article III because recovery by participants and beneficiaries would provide them with a concrete and cognizable "bargaining chip" in future funding of the plan. The Ninth Circuit argued that an employer might potentially respond to recovery of millions on dollars on behalf of a plan by diminishing its own contributions to the plan. Even if this is a possibility,[38] so is the converse; more importantly, the unanticipated infusion of millions of dollars into the plan would provide employees with a substantial bargaining chip with which to argue that employee co-payments, deductibles, and other contributions should be reduced (or at least not increased further) in light of this unanticipated recovery, and that the employer should at least share this monetary windfall with participants and beneficiaries.

This Court has repeatedly found that the creation of such a "bargaining chip" satisfies the requirements of Article III standing. For example, in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court held that Snake River Potato Growers, which often negotiated to acquire potato processing facilities, had Article III standing to challenge the Line-Item Veto Act because the use of that Act by President Clinton deprived them of "a statutory bargaining chip" during those potential purchases. *Id.* at 432. The Court held:

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of private funds from a fiduciary through a suit filed on behalf of a small and insular set of participants and beneficiaries and on whose behalf those recovered funds are statutorily required to be expended.

[38] *But see supra* note 35 (noting that such a response by the employer might well be prohibited by the anti-inurement provisions of ERISA).

> By depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617, 620 (1971); 3 K. Davis & R. Pierce, ADMINISTRATIVE LAW TREATISE 13-14 (3d ed. 1994) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement.").

Id. at 432-33; *see also id.* at 433 (discussing the existence of Article III standing on this same basis in *Bryant*). Participants and beneficiaries who recover millions of dollars on behalf of a plan pursuant to Section 502(a) generate a substantial bargaining chip with which they may pressure their employers – either individually or through collective bargaining – to continue the same employer contributions they had already agreed to make and to use the windfall to increase coverage or reduce employee costs. The recovery of such a multi-million dollar bargaining chip is a sufficiently concrete benefit to ensure sufficient interest in the controversy and hence Article III standing for participants and beneficiaries of a plan.

Fifth, Section 502(a) satisfies Article III because recovery on behalf of the plan will likely result in a reduction of participant and beneficiary costs. As noted *supra*, employers regularly – and increasingly – respond to higher health care plan costs by reducing coverage and/or increasing employee co-payments and deductibles.[39] It does not take a degree (or firm belief) in trickle-down economics to recognize that the unexpected infusion of millions of dollars into a plan, as well

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[39] *See* Facts on Health Care Costs, *supra* note 3.

as injunctive relief that results in millions of dollars in additional yearly rebates from fiduciaries, will diminish the pressure on employers to restrict coverage or increase employee costs. As the Secretary of Labor argued below:

> We note that in the present case, * * * the participants and beneficiaries may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure. Although the Plans' sponsor may take any recovered rebates and discounts and use these funds at their own disposal, this does not foreclose the possibility that the Appellants may directly benefit from a judgment in their favor.[40]

The likelihood of such concrete benefits is more than adequate to ensure a "personalized stake" in the controversy sufficient for constitutional standing under Article III.

Finally, even if the Ninth Circuit is somewhat dubious about the benefits to participants and beneficiaries of recovery on behalf of a plan pursuant to Section 502(a), Congress and the Executive Branch are not. Congress authorized participant and beneficiary standing under Section 502(a) precisely because it concluded that such individuals would benefit from recovery of plan assets from breaching

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[40] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 31a.

fiduciaries.[41] The Department of Labor has similarly concluded that fiduciaries who obtain compensation (as AdvancePCS does) from assets of the plan may adversely affect participants.[42] Indeed, the entire purpose of congressionally authorized participant and beneficiary standing under Section 502(a) was to ensure that these individuals, who are the ones most directly affected by a breach of fiduciary duty and the resulting increase in health care costs, are entitled to sue.

As Justice Kennedy wrote in *Lujan*, and as this Court recently reiterated in *Massachusetts v. EPA*, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). Congress has done precisely that in Section 502(a). While Congress must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit," and while a wholly generalized "citizen suit[] to vindicate the public's nonconcrete interest in the proper administration of the laws" may be insufficient, *id.*, neither barrier exists here. Congress has expressed in Section 502(a) its belief that recovery on behalf of a plan will sufficiently benefit a select, discrete group – participants and beneficiaries in that plan – such that these individuals should be entitled to seek relief. When, as here, Congress has "articulated a chain of causation" and has expressly granted standing to discrete parties that may well be affected by recovery, Article III does not preclude the assertion of such a congressionally authorized remedy.

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[41] S. Rep. No. 93-127, at 35; H.R. Rep. No. 93-1280, at 301, 320-27; 120 Cong. Rec. 29,933.

[42] *See, e.g.*, Department of Labor Field Assistance Bulletin 2002-3 (Nov. 5, 2002), at http://www.dol.gov/ebsa/regs/fab 2002-3.html.

Section 502(a)(2) and (a)(3) are thus valid because participants and beneficiaries have adequate injury-in-fact sufficient to satisfy Article III. The Ninth Circuit accordingly erred when it struck down these essential and irreplaceable components of the "carefully integrated" ERISA enforcement regime enacted by Congress.

2. The Ninth Circuit's holding conflicts with this Court's representational standing precedents.

As the Secretary of Labor strenuously argued below, Section 502(a) is also consistent with Article III because participants and beneficiaries have valid representational standing, which does not require a litigant to demonstrate that she has suffered her own injury. Participants and beneficiaries have representational standing for three reasons.

First, participants and beneficiaries have valid representational standing to file suit on behalf of the Plans. As this Court has made clear, Section 502(a)(2) "authorizes suits by four classes of party-plaintiffs, the Secretary of Labor, participants, beneficiaries, and fiduciaries," and each such party brings its claims "in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. Just as executors, trustees, and guardians *ad litem* need not show injury-in-fact to themselves to sue on behalf of another, so too may (and does) Section 502(a) validly permit participants and beneficiaries to sue as representatives of the plan. As the Secretary of Labor explained below:

> [S]ince the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recoverable by the Plans, which have allegedly been injured by

> fiduciary breaches. This is enough to establish standing for Article III purposes.

App., *infra*, 24a. Because the Plans have suffered injury-in-fact, and because Section 502(a) expressly authorizes participants and beneficiaries to sue in a representative capacity on behalf of the Plans, Article III standing exists. As the Secretary of Labor further explained:

> Because * * * the plaintiffs have representational standing under section 502 to sue to redress the alleged injur[i]es to the Plans, they meet the causation and redressability prongs of Article III as well. Plaintiffs[] claim that the disloyal actions by Advance injured the Plans, and injunctive or monetary relief could conceivably remedy that injury. Again, the focus of inquiry is on the Plans.[43]

Section 502(a) accordingly satisfies Article III because it validly grants representational standing to participants and beneficiaries to file suit for recovery on behalf of a Plan that has suffered injury-in-fact.

Second, at a minimum, Section 502(a)(2) properly authorizes participants and beneficiaries to sue as representatives of the Secretary of Labor. Section 502(a)(2), unlike Section 502(a)(3), expressly authorizes the Secretary to bring actions against plan fiduciaries, and alleged violations of 29 U.S.C. § 1109 may accordingly be brought by the Secretary as well as by plan participants and beneficiaries. If, as is likely the case,[44] the Secretary has Article III standing to

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[43] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a.

[44] *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (noting that the United States has

vindicate the United States' substantial interest in the enforcement of ERISA, Section 502(a)(2) satisfies Article III by authorizing the directly affected participants and beneficiaries to sue in a representative capacity on its behalf.

There is no risk here that Section 502(a)(2) authorizes wholly generalized citizen actions. To the contrary, Section 502(a)(2) limits those with representational standing to those "within the zone of interests to be protected or regulated by the statute;" *i.e.*, to participants and beneficiaries.[45] Because Congress may grant representational standing to private litigants for injuries to the United States,[46] and because Section 502(a)(2) expressly authorizes participant and beneficiary suits for violations of 29 U.S.C. § 1109, such

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standing for both economic injury as well as for injury to its sovereignty arising from the violation of its laws).

[45] *Valley Forge Christian Coll. v. Americans United For Separation of Church and State*, 454 U.S. 464, 473 (1982). Although the "zone of interests" test concerns prudential standing, and thus does not apply here since Congress indisputably may (and has in Section 502(a)) override prudential concerns and authorize standing to the full extent of Article III, the limited nature of the representational standing granted by Section 502(a) strongly supports its validity.

[46] *Vermont Agency of Natural Res.*, 529 U.S. at 772. The Ninth Circuit concluded that standing existed in *Stevens* only because the *qui tam* suit there assigned a portion of the recovery to the plaintiff, whereas no such financial assignment exists here. Respectfully, this interpretation turns *Stevens* on its head, since Justice Scalia expressly noted therein that representative standing might well exist for the principal relief granted by the statute (*e.g.*, money recovered by the United States), and that difficult standing questions arose *only* with respect to that portion of the recovery assigned to the relator. *Id.* at 772-73 ("It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, in whose name * * * the suit is brought. * * * For the portion of the recovery *retained by the relator*, therefore, some explanation of standing other than agency for the Government must be identified." (emphasis added)).

individuals have permissible Article III representative standing on behalf of the United States.

Finally, Section 502(a) does not violate Article III because participants have "statutory standing" as well. As this Court has repeatedly held, "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Sedin*, 422 U.S. 490, 500 (1975); *see also Lujan*, 504 U.S. at 578 (same). Congress has expressly granted ERISA participants and beneficiaries the statutory right to recover for their plan all compensation improperly obtained by a breaching fiduciary. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2), & 1132(a)(2). As the Secretary of Labor has explained:

> Thus, where, as here, an entity is alleged to have violated its statutory duties as a fiduciary to ERISA plans, that violation creates standing in those (such as the participants) who are authorized to sue to enforce those duties. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., with whom Blackmun and Powell, J.J., join, concurring) (statute conferred standing that would have been doubtful under Article III in the absence of the statute).[47]

The congressional grant of statutory standing to participants and beneficiaries in Section 502(a) is as valid as similar statutory grants previously upheld by this Court. *See, e.g.*, *Havens Realty v. Coleman*, 455 U.S. 363, 373-75 (1982) (statutory standing under Fair Housing Act for "testers" who had no intent to rent); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 6 (1968) (standing to challenge conduct of Tennessee Valley Authority). Indeed, because the statutory standing

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[47] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 27a.

provided by Section 502(a) is granted not only to a discrete group (moreover, one that may well suffer injury-in-fact), but also provides standing for suits against private fiduciaries (rather than the government),[48] the validity of statutory standing here is far greater than in many other cases in which this Court has found such standing consistent with Article III.

Participants and beneficiaries have an express statutory right, pursuant to Section 502(a), to bring an action for disgorgement and other equitable relief from a breaching fiduciary on behalf of their ERISA health plans. The Ninth Circuit erroneously held that Section 502(a) violated Article III. Participants and beneficiaries have valid injury-in-fact, as well as representational, standing. The invalidation of this central ERISA enforcement mechanism by the Ninth Circuit should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[48] *Cf. Lujan*, 504 U.S. at 578 (intimating that statutory standing may perhaps be limited "in suits against the Government"). This is because "the law of Article III standing is built on a single basic idea – the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and the authorization of generalized citizen suits against the government may implicate such concerns. By contrast, when, as here, standing exists purely to resolve suits involving private parties (*e.g.*, for breach of fiduciary duty), such Article III concerns are minimal.

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